Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,

Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (Appendix B of Petition) is unreported. The opinion of the Court of Appeals for the Third Circuit, and the dissenting opinion (Appendix A of Petition) are reported at 535 F.2d 786.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a municipal ordinance prohibiting "for sale" and "sold" signs in residential districts, in an attempt to counteract a fear psychology and inhibit panic-selling in a community which is fully integrated in its housing pattern, is a violation of the First Amendment right of free speech where other means to advertise the proposed and/or consummated sale of a home exist and the effect of the ordinance is the minimum intrusion possible to accomplish the purpose?

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The Constitutional provisions and ordinance involved are adequately set forth in the Petition.

STATEMENT

Willingboro Township is a community of approximately 45,000 residents located in Burlington County, New Jersey. (Jt. App. 128a). Its residential development commenced in the late 1950's and is attributable mainly to Levitt and Sons, Inc. In the early years of development, Levitt refused to sell its homes to minority group members. This racially-based housing discrimination was enjoined by the New Jersey Supreme Court. *Levitt and Sons, Inc. v. Division Against Discrimination in the State Department of Education*, 31 N.J. 514, 158 A.2d 177 (1960), appeal dismissed, 363 U.S. 418 (1960). After the conclusion of that litigation, Levitt instituted a policy of actively encouraging the development of the Township as an integrated community (Jt. App. 182a). As a result, there is a totally integrated housing pattern in Willingboro. While development of the Township proceeded sequentially through ten different areas or "parks" (i.e., Millbrook Park, Buckingham Park, Garfield Park, etc.), no park can be denominated a white section, a black section or a Spanish-speaking section, each park having members of almost all racial and ethnic groups living together. (Jt. App. 183a; 214a). As indicated in the decision below, "a close approach was achieved to that housing ideal sought by fair-minded citizens, mandated by the federal Fair Housing Act, 42 U.S.C. §3604, and impelled by our Constitution." 535 F.2d at 789.

However, in the late 1960's, racial problems and conflict surfaced. In response, the Township Council, pursuant to *N.J.S.A.* 10:5-10, created the Willingboro Human Relations Commission, which is statutorily charged with attempting "to foster through community effort or otherwise, good will, cooperation and conciliation among the groups and elements of the inhabitants of the community" and which was empowered by Township Council "to make recommendations to [Township Council] for the development of policies and procedures in general and for programs of formal and informal education that will aid in eliminating all types of discrimination based on race, creed, color, national origin, ancestry, age, marital status or sex." The Township also became a member of National Neighbors, an organization promoting integrated housing and discussing the various problems arising from this. (Jt. App. 183a).

Since Willingboro's population has been to a certain extent transient (being close to several military installations) and because over eighty realtor's offices competed for the sale of homes in the Township, which had a uniformity in home construction, the proliferation of "for sale" and "sold" signs helped to create the impression that many people were leaving the community. (Jt. App. 233a).

As a result, a fear psychology developed among many home owners. One Councilman described this as:

> ". . . people in the community were expressing a desire to sell their homes and move to other areas of Burlington County because what they sensed was a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county.
>
> "People would indicate that: 'Everybody on my street is moving. I've got to get out of this town before it's too late.'
>
> "People would express a concern of: "with all the turnover, my property value is going to go down. I got to get out.'" (Jt. App. 181a).

From a concern for the preservation of the well-integrated character of the community and a desire to counteract the growing fear psychology, the Human Relations Commission, after an investigation noting the increasing panic selling, recommended to Township Council the prohibition of "for sale" and "sold" sign in residential areas of the Township. This recommendation, as described by one Commission member, was one attempt to respond to the developing fear psychology:

> "I think the Commission would like to see a community which is as harmonious as it would choose to be without the kind of pressures, if I may use that term, which would induce people to sell when in fact they don't want to sell; and I think that's the thing that the ordinance was directed at.
>
> "Individuals were responding and reacting to a rash of signs, or, one sign which would lead to another, and another and another.

> "I think that's the concern the Commission was trying to address.
>
> "If the neighborhood was or is to be all black, and it that is a decision by choice, choice of the individuals involved, then the Commission I believe would have no concerns about that. But if neighbors, residents of the township are being pushed into this kind of thing by the presence of a sign or signs, then I think the Commissioner's concern would be that that ought not to be, this is not the free choice that people ought to exercise, should exercise." (Jt. App. 244a-245a).

Township Council investigated how similar ordinances had worked in other municipalities. It held two public hearings, one before and one after the drafting of the ordinance. (Jt. App. 186a). The ordinance under review was then adopted. Suit was commenced by a realtor and by a corporation owning a home in the Township. After a two day trial, the District Court for the District of New Jersey concluded that the ordinance was unconstitutional, holding that (1) "the ordinance brings about a serious denial of a property owners [sic] right to freely and reasonably express to others the desire to sell in violation of the First Amendment" and (2) "in its application the Willingboro ordinance results in an infringement upon the fundamental right to travel."

Upon appeal, the United States Court of Appeals for the Third Circuit reversed the District Court decision and upheld the constitutionality of the ordinance. That Court concluded that while commercial speech was entitled to First Amendment protection, in assessing and balancing the interests involved, "[t]he preservation of a desirable community impels a priority of the community's needs over commercial transactions in the community as they see fit, so long as those community needs are reasonably estab-

lished and the means chosen to meet them do not intringe upon the fundamental constitutional rights of individual businessmen." It then determined that "the limited denial occasioned by the ordinance herein [resulting] from a reasonable exercise of the police power in furthering the public welfare by forestalling panic selling and its offspring, segregation." Finally, the Court found that "[s]ellers are free to sell to any economically qualified buyer. Economically qualified buyers of any racial group are free to buy any home in any section of Willingboro. No burden on commerce or a deterring influence on the individual right to migrate has been shown."

A Petition for Rehearing en banc was denied and a timely Petition for a Writ of Certiorari followed.

ARGUMENT

The issue in this case is rather narrow, not warranting review by this Court on certiorari. This case does not seek to question whether commercial speech is to be afforded any protection under the First Amendment (all parties and the Courts conceed that is so) nor does this case inquire whether that First Amendment protection can be overridden by a compelling State interest (that is clear to all concerned.) Specifically, the question is a factual issue concerned with the sufficiency of proof of a compelling State interest to override the First Amendment.

While the question presented as phrased by Petitioners does refer, in addition to freedom of speech, to equal protection of the law and due process, no mention of either constitutional concept is made in the supporting Reasons for Granting the Writ. There is only one issue—one of fact as to the sufficiency of proof under a clearly articulated standard defining the scope of First Amendment rights—not justifying the granting of the Writ.

Clearly, the decision of the Court of Appeals was correct and there is no conflict of decision requiring review by this Court.

I. THE DECISION BELOW IS CLEARLY CORRECT

It is clearly-established that "speech is not stripped of its First Amendment protection merely because it appears in [the] form [of commercial speech]." *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975). However, it is similarly evident that "official action with adverse impact on First Amendment rights must be justified by a public interest that is 'compelling' or 'paramount'" nor "may it be achieved by unduly broad means having an unnecessary impact on pro-

tected rights of speech, press, or association." *Branzburg v. Hayes*, 408 U.S. 665, 680-1 (1972). The Township of Willingboro manifestly established a compelling State interest which was not overly broad in its impact. A brief review of the facts amply demonstrates this.

Willingboro, after the 1960 decision in *Levitt and Sons, Inc. v. Division Against Discrimination in the State Department of Education, supra.*, has actively worked on and put into practice the reality of full racial and ethnic integration in housing. (Jt. App. 182a-183a). Thus, viewed in an historical context, the action of Township Council cannot be presumed to be other than consistent with this positive approach to living in racial and ethnic harmony. See *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 517 F.2d 409, 414 (7 Cir. 1975), cert. granted, 423 U.S. 1030 (1975), as to the propriety of referring to an historical context in evaluating the discriminatory effect of a municipal decision.

It became quite evident to Township Council that there was a fear psychology developing based on the existence of "for sale" and "sold" signs. (Jt. App. 181a; 207a; 240a; 248a.) While Township Council believed this to be "an irrational reaction," Council also concluded that it had to act "to give people the feeling of stability so that they would not overreact to a particular situation." (Jt. App. 181a). It decided, upon recommendation of the Human Relations Commission and after investigation of a similar approach in a municipality in Ohio (Jt. App. 184a-185a), to prohibit "for sale" and "sold" signs in the residential areas of the Township. Although Willingboro was and had been fully integrated, Township Council concluded that the fear psychology might result in Willingboro metamorphosing from an integrated community to a ghetto (Jt. App. 182a). The decision was to "nip it in the bud and stop it now before too much of this got out of hand." (Jt. App. 207a).

Without question, the promotion and maintenance of integrated housing is of the highest public interest. See 42 U.S.C. §3601 *et seq.* (Fair Housing Act); *N.J.S.A.* 10:5-1 *et seq.* (Law Against Discrimination). Contrasted with this is the limited intrusion on the First Amendment right of free speech vis-a-vis commercial "for sale" signs. There can be no doubt that the minimal restriction on commercial speech, when balanced against the desire to eliminate a fear psychology as an impediment to the maintenance of integrated housing, must be sustained. Indeed, the efficacy of this statement is strengthened by the minimal aspect of the intrusion. Petitioner Mellman himself indicated in testimony that approximately seventy per cent of his real estate transactions were initiated other than through on-site "for sale" signs. (Jt. App. 135a). Advertisement and personal contact, the two other main areas in initiating real estate transactions, were not at all affected by the ordinance. In reality, real estate sales maintained their pre-ordinance level after the adoption of the ordinance (Jt. App. 170a). Thus, the sale of residences was not affected, only the means of sale and the reason for some owners wanting to sell. (Jt. Ap. 191a-192a). Clearly, there was no other approach to minimizing the fear psychology, than banning the "for sale" signs, that would have been as effective and yet would have as such a minimal interference in the process of selling homes. Council acted only to the extent necessary and in the paramount public interest.

II. THERE IS NO CONFLICT OF DECISION

In their Petition, Petitioners argue that this decision is at odds with *Bigelow v. Virginia*, 421 U.S. 809 (1975).

However, a careful comparison of the two decisions will reveal their consistency in philosophy, but certain critical differences in their factual context.

Jeffrey C. Bigelow, the managing editor of a newspaper in Virginia, had published an advertisement offering a source of information for the procuring of a legal abortion. A Virginia statute declared that one was guilty of a misdemeanor if he published or advertised the procuring of an abortion. Mr. Bigelow was convicted under this statute. This Court reversed the judgment of conviction, holding that the statute, as applied, infringed upon the First Amendment rights of Mr. Bigelow.

In the opinion delivered by Mr. Justice Blackmun, it was noted that:

> "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." 421 U.S. at

In a footnote to this quoted sentence, reference was made to its consistency with certain other decisions, in which "there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating." In the case of Willingboro, the clear relationship obtains between the existence of the means of advertising (the signs), as opposed to their specific content, and the psychological fear (resulting in panic selling) which the Township legitimately could regulate. The footnote references to *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5 Cir. 1975), cert. denied, 414 U.S. 826 (1973), a case upholding a restriction on free speech in an antiblockbusting context, and *United States v. Hunter*, 459 F.2d 205 (4 Cir. 1972), cert. denied, 409 U.S. 934 (1972), which involved a newspaper

advertisement for a furnished apartment in what was denominated as a "white home," point out both the similarity and difference between the *Bigelow* case and the present case, and yet the consistency in the philosophies behind them. In *Bigelow*, there was no paramount public interest to justify the intrusion on First Amendment rights, yet, as made clear in that decision, this compelling public interest may support a regulation when that interest is concerned with maintaining equal racial and ethnic opportunity. Similarly, Willingboro's regulation was precisely aimed at eliminating the threat to maintaining that equal racial and ethnic opportunity in housing, once achieved. Yet, unlike *Bigelow*, the activity regulated referred to panic selling which is unlawful under 42 U.S.C. §3604(e), while abortions were legal in New York State. Essentially, then, the present case and *Bigelow* both espouse a similar philosophy—permitting an interference with First Amendment rights only in the face of a strong public interest, such as the maintenance of equal racial and ethnic opportunity. The decisions, are in reality, harmonious.

Petitioners argue that Willingboro is attempting to "freeze in" an existing racial balance. Without referring to the philosophical merits of affirmative action in such a situation, (see *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1133 (2 Cir. 1973)), the obvious response is that this argument is without factual basis. Willingboro adopted the ordinance so that its residents would not be inclined to sell their homes and move out of fear; it does not prohibit anyone who is financially qualified from purchasing a home anywhere in the Township; it does not restrict or inhibit any resident from selling a home and moving elsewhere. Rather, it only seeks to arrest the fear psychology as an impelling reason to sell and replace that with

an unfettered free choice. There is absolutely no direct correlation (either proven or reasonably conjectured) between the maintenance of a racial and ethnic balance and the ordinance intent. The ordinance affects all equally. Beside, it should not be assumed that a municipality which has consistently acted to encourage equal opportunity in housing now changes its position "in mid-stream."

Thus, there is no conflict with any decision of this Court. Indeed, the philosophy behind this decision is consistent with that espoused in *Barrick Realty, Inc. v. City of Gary, Indiana*, 491 F.2d 161 (7 Cir. 1974), which upheld a similar ordinance aimed at panic selling in an attempt to halt resegregation. In truth, any other result reached below would have been inconsistent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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